INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Specifications of errors to be urged	13
Reasons for granting the writ	13
Conclusion	25
Appendix	27

CITATIONS

Cases:

Allied Mutuals Liability Ins. Co. v. *De Jong*, 209 App. Div. 505, 205 N. Y. S. 165	23
Andrews v. *Commodore Knitting Mills, Inc.*, 257 App. Div. 515, 13 N. Y. S. (2d) 577	23
Associated Indemnity Corp. v. *Industrial Accident Commission*, 128 Cal. App. 104, 16 Pac. (2d) 774	6
Boehm v. *Spreckels*, 183 Cal. 239, 191 Pac. 5	23
Robert C. Buell & Co. v. *Danaher*, 127 Conn. 606, 18 A. (2d) 697	23, 25
Creameries of America v. *Industrial Commission*, 98 Utah 571, 102 Pac. (2d) 300	24
Electrolux Corp. v. *Danaher*, 128 Conn. 342, 23 A. (2d) 135	24
Ex parte W. T. Smith Lumber Co., 206 Ala. 485, 90 So. 807	23
Fuller Brush Co. v. *Industrial Commission*, 99 Utah 97, 104 Pac. (2d) 201	24
Gallaher v. *Ricketts*, 187 So. 351; annulled 191 So. 713 (La.)	24
Glielmi v. *Netherland Dairy Co.*, 254 N. Y. 60, 171 N. E. 906	23
Globe Grain & Milling Co. v. *Industrial Commission*, 98 Utah 36, 91 Pac. (2d) 512, amended, 98 Utah 48, 97 Pac. (2d) 582	25
Gray v. *Powell*, 314 U. S. 402	13, 16
Gulf Refining Co. v. *Brown*, 93 F. (2d) 870	23
Hampton v. *Macon Printing Co.*, 64 Ga. App. 150, 12 S. E. (2d) 425	24
In re Fidel Ass'n, 287 N. Y. 626, 139 N. E. (2d) 265	25
In re Foy, 116 Pac. (2d) 545	24
In re Levine, 283 N. Y. 577, 27 N. E. (2d) 439	24
In re Scatola, 282 N. Y. 689, 26 N. E. (2d) 815	24
International Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72	19
International Stevedoring Co. v. *Haverty*, 272 U. S. 50	18

Cases—Continued

	Page
Kaus v. *Huston*, 35 F. Supp. 327, aff'd 120 F. (2d) 183	23
Lehigh Valley Coal Co. v. *Yensavage*, 218 Fed. 547, certiorari denied, 235 U. S. 705	18
Marlin-Rockwell Corp. v. *National Labor Relations Board*, 116 F. (2d) 586, certiorari denied, 313 U. S. 594	19
Matter of American Scale Co., 19 N. L. R. B. 124	21
Matter of Connor Lumber & Land Co., 11 N. L. R. B. 776	20
Matter of Deep River Timber Co., 37 N. L. R. B. 210	21
Matter of Electrolux Corp., 288 N. Y. 440	24, 25
Matter of Interstate Granite Corp., 11 N. L. R. B. 1046	21
Matter of Kelly Co., 34 N. L. R. B. 325	21
Matter of KMOX Broadcasting Station, 10 N. L. R. B. 479	20
Matter of Metro-Goldwyn-Mayer Studios, 7 N. L. R. B. 662	20
Matter of Harry Murphy, 37 N. L. R. B. 487	22
Matter of Park Floral Co., 19 N. L. R. B. 403	21
Matter of Phelps Dodge Corp., 34 N. L. R. B. 846	22
Matter of Post-Standard Co., 34 N. L. R. B. 226	21
Matter of Edward F. Reichelt et al., 21 N. L. R. B. 283	21
Matter of Seattle Post-Intelligencer, 9 N. L. R. B. 1262	20
Matter of James E. Stark Co., 33 N. L. R. B. 1076	21
Matter of Sun Life Insurance Co., 15 N. L. R. B. 817	21
Matter of Trawley Maris Stella, Inc., 12 N. L. R. B. 415	21
Matter of Twentieth Century-Fox Film Corp., 32 N. L. R. B. 717	21
Matter of Veta Mines, 36 N. L. R. B. 288	22
Matter of John Yasek, 37 N. L. R. B. 156	22
Milk Wagon Drivers Union v. *Lake Valley Farm Products Co., Inc.*, 313 U. S. 391	24
Moorman Mfg. Co. v. *Unemployment Compensation Commission*, 230 Iowa 123, 296 N. W. 790	25
Mountain Meadow Creameries v. *Industrial Accident Commission*, 25 Cal. App. (2d) 123, 76 Pac. (2d) 724	24
National Labor Relations Board v. *Blount*, 131 F. (2d) 585, certiorari denied, 318 U. S. 791	18
National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206	19
North Whittier Heights Citrus Ass'n v. *National Labor Relations Board*, 109 F. (2d) 76, certiorari denied, 310 U. S. 632	20
Pacific Employers Insurance Co. v. *Industrial Accident Commission*, 3 Cal. (2d) 759, 47 Pac. (2d) 270, reversing 38 Pac. (2d) 809	6, 24
Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U. S. 177	20
Press Publishing Co. v. *Industrial Accident Commission*, 190 Cal. 114, 210 Pac. 820	24
Pure Baking Co. v. *Early* (E. D. Va.), decided March 24, 1943, Commerce Clearing House, Unemployment Insurance Service, Federal, Par. 9062	24

Cases—Continued. Page

Rochester Telephone Corp. v. *United States*, 307 U. S. 125 16
Salt Lake Tribune Publishing Co. v. *Industrial Commission*, 99 Utah 259, 102 Pac. (2d) 307 24
Schomp v. *Fuller Brush Co.*, 124 N. J. L. 487, 12 A. (2d) 702, aff'd 126 N. J. L. 368, 19 A. (2d) 780 24
Shields v. *William Freihofer Baking Co.*, 147 Pa. Super. 455, 24 A. (2d) 54 24
Shields v. *Utah Idaho Central R. Co.*, 305 U. S. 177 16
Singer Mfg. Co. v. *Rahn*, 132 U. S. 518 23
South Chicago Coal & Dock Co. v. *Bassett*, 309 U. S. 251 13, 16, 18
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 16
Texas Co. v. *Zeigler*, 177 Va. 557, 14 S. E. (2d) 704 23
United States v. *American Trucking Associations*, 310 U. S. 534 18
Walker v. *Altmeyer*, decided July 12, 1943 (C. C. A. 2) 13, 14, 15
Warner v. *Goltra*, 293 U. S. 155 18
Western Express Co. v. *Smeltzer*, 88 F. (2d) 94 23
Wilson v. *Times Printing Co.*, 158 Wash. 95, 290 Pac. 691 24

Statutes:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., § 151, et seq.):
Section 1 27
Section 2 20, 27
Section 7 28
Section 8 28
Section 9 28
Section 10 15, 30
Social Security Act as amended August 10, 1939 (53 Stat. 1373):
Section 203 (42 U. S. C., § 403) 14
Section 205 (42 U. S. C., § 405) 15
Section 209 (42 U. S. C., § 409) 14

Miscellaneous:

Holmes *Agency*, 4 Harv. Law Rev. 345, 5 Harv. Law Rev. 1 17
Issues Involved in Determining Eligibility Under the Old Age and Survivors Insurance Program, Social Security Yearbook, 1941, pp. 47–51 25
Restatement of the Law of Agency, Sections 2, 220 17
Some Aspects of Coverage Under Insurance Provisions of the Social Security Program, Social Security Yearbook, 1940, pp. 74–75 25
Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 Col. Law Rev. 1015 25

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 336

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEARST PUBLICATIONS, INCORPORATED

No. 337

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

STOCKHOLDERS PUBLISHING COMPANY, INC.

No. 338

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEARST PUBLICATIONS, INCORPORATED

No. 339

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE TIMES-MIRROR COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that writs of cer-

tiorari issue to review decrees of the United States Circuit Court of Appeals for the Ninth Circuit entered on June 10, 1943 (R. 1852–1854), setting aside orders of the Board issued against Hearst Publications, Incorporated, Stockholders Publishing Company, Inc., and The Times-Mirror Company.

OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 1843–1852) are not yet reported. The findings of fact, conclusions of law, and orders of the Board (R. 331–351, 454–479) are reported in 39 N. L. R. B. 1245, 1256. The decisions of the Board in prior representation proceedings which form part of the record in these cases (R. 76–146, 187–197, 237–240) are reported in 28 N. L. R. B. 1006, 33 N. L. R. B. 941, 36 N. L. R. B. 285.

JURISDICTION

The decrees of the Circuit Court of Appeals were entered on June 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's ultimate finding that certain individuals are employees within the meaning of the Act is to be accepted by the courts

when not unreasonable or is subject to *de novo* judicial review.

2. Whether the Board properly found that persons who sell newspapers subject to the supervision and control of the publishing company are employees within the meaning of Section 2 (3) of the Act.

3. Whether the context of the Act furnishes the basis for a definition of employment broader in scope than the common law definition of a servant.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 27–30.

STATEMENT

In proceedings instituted by four separate petitions for investigation and certification of representatives under Section 9 (c) of the Act, filed by the Los Angeles Newsboys Local Industrial Union, No. 75, affiliated with the Congress of Industrial Organizations, herein called the Union, the Board issued a decision and direction of elections finding that respondents were engaged in commerce within the meaning of the Act, that their newsboys were employees under Section 2 (3), and that the regular full-time newsboys vending each separate newspaper constituted a separate appropriate bargaining unit and directing elections (R. 77–121;

28 N. L. R. B. 1006). The Union was selected by a majority of the eligible employees in each election and as a result was certified by the Board as the representative of each of respondents' newsboys within the appropriate unit (R. 187–197, 237–240; 33 N. L. R. B. 941, 36 N. L. R. B. 285).

Thereafter, in proceedings under Section 10 (c) of the Act, the Board, on March 30, 1942, issued decisions finding that each of the respondents, subsequent to the certification of the Union, had refused to bargain collectively with it, thereby engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act (R. 331–350, 455–479; 39 N. L. R. B. 1245, 1256). The Board ordered each respondent to cease and desist from refusing to bargain with the Union or engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees, upon request to bargain collectively with the Union, and to post appropriate notices (R. 347–350, 475–479; 39 N. L. R. B. 1245, 1256).

The evidence in support of the Board's finding that the newsboys are employees of the respective respondents (R. 88–111), may be summarized as follows:

Respondents publish four newspapers;[1] the newsboys within the appropriate bargaining units

[1] Hearst Publications, Incorporated, publishes the Los Angeles Evening Herald and Express, an evening paper published daily except Sunday, and the Los Angeles Examiner, a morning paper published daily, including Sunday (R. 49, 69). The department of Hearst Publications, In-

who distribute these newspapers are not boys, as the name implies, but are mature or elderly men, often with families to support, who depend upon their earnings from the distribution of respondents' newspapers on the streets as their source of livelihood (*Herald*, R. 859–860; *Examiner*, R. 1419, 1438; *Times*, R. 1284, 1309–1310; *News*, R. 558–559, 859–860).[2] Many of them have long service records (*Herald*, R. 599, 746, 799–800, 1117; *Examiner*, R. 1397, 1404; *Times*, R. 1284, 1315; *News*, R. 749, 1118). They differ in these respects from schoolboys who are known as carriers and have a home-delivery route before or after school, or who act as part-time street salesmen (R. 566, 860–861, 865). The latter are expressly excluded from the unit found by the Board to be appropriate (R. 114–116) and the Board has not passed upon the applicability of the Act to such persons.

---

corporated, which publishes the Los Angeles Herald and Express, is herein called the Herald; that which publishes the Los Angeles Examiner is herein called the Examiner. Respondent Stockholders Publishing Co., Inc., publishes the News, a paper published daily except Sunday (R. 61), and respondent The Times-Mirror Company, publishes daily, including Sunday, the Los Angeles Times, a morning paper, which is herein called the Times (R. 64–65, 1169).

[2] Throughout this petition, reference will be made to the respondents collectively except where an individual factual variation requires a reference to the specific respondent. The record references following any statement referring to respondents collectively will indicate what evidence supports the statements with respect to each respondent in the following manner (*Examiner*, R. —; *Herald*, R. —; *Times*, R. —; *News*, R. —).

The newsboys are "hired" and "fired," disciplined, directed, and supervised (see pp. 8–10, *infra*) by respondents through supervisory employees known as the "district manager" or the "district man" (R. 549, 1180; *Examiner,* R. 1373, 1432; *Herald,* R. 605–607; *Times,* R. 1156; *News,* R. 1125, 1127–1129). The district managers keep lists of the newsboys in their districts, the locations where they are stationed, the quota assigned to each boy, the names of the checkmen or "main spot" boys[3] through whom they distribute and the amounts so subdistributed (*Herald,* R. 572, 574, 616–629; *Examiner,* 1383–1384; *Times,* R. 504–521; *News,* R. 1091–1093). The district managers determine the number of newspapers to be taken out each day for distribution by the checkmen and newsboys in their respective districts in the light of the importance of the day's headline, sometimes doubling or trebling the usual number (*Examiner,* R. 1365–1366, 1374; *Herald,* 1048; *Times,* R. 1156–1157, 1178, 1285, 1293–1294; *News,*

[3] Checkmen both receive papers for themselves and also for distribution to other newsboys in the vicinity. They are paid a small salary for performing the latter service, and respondents have conceded that, to the extent that such services are performed, the checkmen are their employees (R. 90, 1846; *Herald,* R. 604–606; *News,* R. 1090). A description of the functions of the checkman is contained in *Pacific Employers Insurance Co.* v. *Industrial Accident Commission,* 3 Cal. (2d) 759, 47 Pac. (2d) 270, and *Associated Indemnity Corp.* v. *Industrial Accident Commission,* 128 Cal. App. 104, 16 Pac. (2d) 774, where such individuals were found to be employees under the California Workmen's Compensation Act.

789). They keep the newsboys informed as to how news is developing, what breaks to anticipate, how to call important headlines, and how to play up special features (*Herald,* R. 578–579, 566–567, 598–599, 794, 806–807, 873; *Examiner,* R. 1363; *Times,* 1220).

In addition, both the Examiner and the Herald maintain further supervision over the checkmen and newsboys through "checkers," who patrol the districts, noting whether the checkmen and newsboys keep hours, "hustle" with due diligence, follow instructions as to the manner of displaying and calling papers, and otherwise conduct themselves in accordance with rules (*Examiner,* R. 1450–1451, 1446–1447, 1484–1485; *Herald,* R. 575–577, 748). The checkers make written reports to the Herald and the Examiner, and when necessary, recommend newboys for discharge, discipline, or reprimand in a written instruction to the district manager (*Examiner,* R. 1446–1451, 1484–1485; *Herald,* R. 575–578, 748). On the News and the Times the district managers themselves kept a close check on these matters (*News,* R. 733, 737–738, 756, 777–778; *Times,* R. 1221–1222, 1330–1333).[4]

[4] The district managers of each paper and the checkers on the Herald and Examiner are under a circulation manager (*Examiner,* R. 1349, 1352, 1446–1448; *Herald,* R. 544–545, 575–578; *Times,* R. 1151; *News,* R. 1079). In addition, certain of the papers employ an intermediate supervisory official between the circulation manager and the district manager, known variously as branch manager, supervisor of street

The newsboy obtains employment by applying at the plant to the district manager, who then assigns him to a particular spot if an opening is available (*Examiner,* R. 1436, 1438–1439, 1495, 1527; *Herald,* R. 590, 595, 606, 638, 696; *Times,* R. 1181–1182, 1250, 1212–1214, 1160; *News,* R. 1098–1099, 1108, 1116). All respondents also furnish transportation to the newsboys from the plant to their respective corners and after work is over bring them back (*Examiner,* R. 1566; *Herald,* R. 995–996; *Times,* R. 1157, 1180, 1183–1185, 1170–1171, 1202, 1207, 1213–1215, 1223–1225, 1228, 1246, 1254, 1345; *News,* R. 1115, 1157, 1171).

The newsboys are subject to removal at will and to transfer or disciplinary lay-offs by the district managers (*Examiner,* R. 1404, 1410–1411, 1455–1456, 1458–1460, 1477–1478, 1525; *Herald,* R. 601, 729, 739–740, 746–747, 876, 878, 901–902, 1146–1147; *Times,* R. 1161, 1185, 1187–1189, 1191–1192, 1221–1223, 1329–1333, 1379–1380). Respondents also exercise extensive control over the details of the newsboys' selling activities. The district man-

---

sales, or street sales manager (*Herald,* R. 548–549, 574, 640; *Examiner,* R. 1362–1363; *Times,* R. 1152, 1154). These officials perform such functions as hearing appeals from newsboys who have been disciplined or "fired" (*Times,* R. 1162, 1176–1177, 1330–1333), relaying from the circulation manager instructions relative to price changes, the time of the appearance of an extra on the streets, or the manner in which the newspaper is to be displayed (*Herald,* R. 562–564, 579), and checking up on the progress of sales (*Herald,* R. 591; *News,* 1072–1073, 1083–1084).

agers not only allocate corners and spots; they even instruct the newsboys where to sell and in what part of the street to stand, and how to hold and display the papers.[5] To further the effective distributions of the newspapers, respondents supply the newsboys with racks, change aprons, ad-

[5] Thus, in accordance with the district managers and checkmen's duty to "see that they [the newsboys] are working" (R. 681, 694), in the case of the News, the district manager directed a checkman to keep one of his "off spot" boys in a traffic spot at certain times (R. 1118–1120); in the case of the Times, a newsboy was instructed at various times to "work traffic and cover this drive-in stand," to "watch them cars in there every 10 or 15 minutes," to "go in the bar and flash your papers," but that the management objected to "blast[ing] your headline," to "hold your paper up and give the customers a chance to see the paper," not to "cause any disturbance * * * [and] go right back to your safety zone" (R. 1218–1219); in the case of the Herald, the district manager instructed a newsboy to "always play that safety zone," an instruction which the newsboy followed although he could sell more papers remaining on his corner (R. 909–910), another newsboy was instructed to stand in the traffic zone to catch the autos (R. 818); in the case of the Examiner, a newsboy was at various times directed to "work the market around there and watch the corner, and also work the white [traffic] line," and to "watch the Times guy" to see that he did not reach customers first (R. 1458, 1460). News and Herald newsboys were given instructions as to the exact manner in which they should display both papers so that the headlines of each might be visible (*News*, R. 725–726, 750–751, 1120; *Herald*, R. 563–564, 642, 796, 832–833). The record contains many other examples of the detailed manner in which respondents supervise the newsboys (*Examiner*, R. 1461–1462, 1468–1469, 1445, 1473, 1481–1484, 1497; *Herald*, R. 716–717, 754–755, 1040; *Times*, R. 1183–1184, 1187, 1186, 1191–1192, 1222, 1243–1244; *News*, R. 756, 777–778, 835, 1098).

vertising placards and similar equipment and the district managers furnish specific instructions to their newsboys with regard to the display of newspapers in the racks and the posting of advertising materials (*Examiner,* R. 1366, 1367, 755, 1371–1372, 1367, 1369, 1485–1487, 1500–1501, 1586, 1606–1607; *Herald,* R. 590, 732, 755–756, 810, 813, 834–835, 838; *Times,* R. 1163, 1165, 1167, 1168, 1172, 1190–1191, 1217, 1220–1221, 1251–1256, 1331; *News,* R. 810–811, 835, 903, 908, 1082–1083, 755–756, 1098, 1105, 1106–1107). Newsboys are required to be at their posts from the time the papers customarily arrive until the close of the selling day (*Examiner,* R. 1380, 1394–1395, 1398, 1434, 1446–1447, 1462–1463, 1487, 1587–1588, 1602, 1608, 1616, 1621, 1623; *Herald,* R. 590–591, 727–728, 748, 795, 880–881, 896–899; *Times,* 1184, 1202–1203, 1224–1225, 1250–1251, 1330–1333; *News,* 733, 737–738, 1098–1099).

Some, but not all (*Herald,* R. 904; *News,* R. 1104, 1111; *Times,* R. 1243–1244, 1628; *Examiner,* R. 1419, 1592, 1622), of the newsboys sell publications other than these involved herein, such as magazines (*Herald,* R. 718, 734–735, 779–780, 806, 822, 837, 849, 908, 932, 941–942, 945–946, 1027–1028; *Times,* R. 1260–1267; *Examiner,* R. 1464–1465, 1471–1474). The sale of such publications constitutes only a relatively minor aspect of the newsboys' activities (*Herald,* R. 754, 780, 787, 806, 843–845, 889, 908, 923, 941–942; *Times,* R. 1271–1272).

There was also an arrangement created by the Herald and News for the handling of both papers by a single set of newsboys (R. 558–559, 564–565, 692–693, 749, 1066, 1071, 1636). The newsboys, in addition, in some instances (but see *Herald,* R. 849–850, 908, 1027; *News,* R. 1111; *Times,* R. 1191, 1208, 1243–1244, 1251, 1325–1326, 1628; *Examiner,* R. 1464, 1592, 1611, 1622, 1628) arrange among themselves for the afternoon newspaper boy to handle small quantities of left-over morning papers, and *vice versa* (*Herald,* R. 719, 734, 778, 780, 846–847, 886–887, 922, 932, 941, 982–983; *Times,* R. 1266, 1278; *Examiner,* R. 1426, 1617, 1622) and occasionally for the handling of a few copies of competing papers for their mutual accommodation (*News,* R. 1108, 1112; *Times,* R. 1261–1262, 1271–1272, 1277; *Examiner,* R. 1417–1418, 1617).

The newsboys are required to sell the papers at prices fixed by the respondents. They do not pay for the papers when they get them, but at the end of each day return unsold papers and are charged a certain amount specified by respondents for the papers not returned. They keep the difference between the latter amount and the price at which the papers are sold to the public. (*Examiner,* R. 1366, 1566; *Herald,* R. 570, 655; *Times,* R. 1158, 1160, 1285–1286; *News,* R. 1086, 1128, 1130, 1084.)

The checkman and newsboys regard themselves as employees (R. 820, 825, 853, 871, 893–894, 898,

1464), were so regarded by representatives of respondents (R. 585, 696, 717, 802, 820, 1116, 900, 1122, 1332, 1484), and by the public (R. 746–747, 969–972, 1040, 1122–1123). They formed the Union (R. 867–872) which sought to negotiate with respondents in their behalf (R. 668–673) and adjusted grievances through collective action (R. 554, 659–677, 871, 873–874, 1085–1086, 1162–1163).

Upon petitions filed in the court below by each of the respondents (R. 1699, 1738, 1764, 1806), the court, Judge Denman dissenting (R. 1851), set aside the orders of the Board upon the ground that respondents' newsboys are not employees (*ibid.*). The court held (1) that the Board's ultimate finding that the newsboys here involved are employees was one of law upon which the court was entitled to exercise a judgment entirely independent of that of the Board, (2) that the word "employee", as used in the Act, must be given its usual common law significance, and (3) that under the common law tests, the newsboys were not employees but independent contractors. The dissent asserted that the Board's inference of an employment relationship was a reasonable one and hence should have been left undisturbed (R. 1852).[6]

[6] The court rejected a contention by respondents that the activities of the newsboys here involved do not affect interstate commerce (R. 1845) and failed to pass upon respondents' claim that the unit found by the Board was inappropriate for collective bargaining purposes.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Board's denial of respondents' claim of exemption from the statute was improper.

2. In holding that the newsboys are "independent contractors."

3. In holding that the issue presents a question of law for the court to decide for itself and in failing to give any weight to the Board's determination that newsboys are employees within the meaning of the Act.

4. In holding that the Board is required to follow the common law definition of employment without regard to the policies or context of the Act.

5. In failing to hold that the relationship involved herein is a personal service relationship which, even under common law standards, clothes the newsboys with employee status.

6. In setting aside and denying enforcement to the Board's orders.

REASONS FOR GRANTING THE WRITS

1. The ruling of the court below that it was entitled to determine *de novo* whether or not the newsboys were employees conflicts with *Walker* v. *Altmeyer,* C. C. A. 2, decided July 12, 1943, as well as with decisions of this Court (*Gray* v. *Powell,* 314 U. S. 402; *South Chicago Coal & Dock Co.*

v. *Bassett*, 309 U. S. 251) in which it has been held that the administrative judgment on such matters is to be respected if rendered after a fair hearing and "in a just and reasoned manner." In *Walker* v. *Altmeyer, supra*, the question was whether Walker was "an employee" within the meaning of Section 209 (b) of the Social Security Act, as amended August 10, 1939 (53 Stat. 1373, 42 U. S. C, sec. 409 (b)).[7] The Social Security Board held that he was, but its decision was set aside by the district court, which drew its own inference from the facts instead of accepting that of the Board. The Circuit Court of Appeals for the Second Circuit reversed, stating that—

> It was the judgment of the administrative body as to an employer-employee relation-

[7] Walker had been paid old-age benefits for a period during which he had failed to report that he had received over $15.00 per month from other sources. Under Section 203 (d) (1) (42 U. S. C., sec. 403 (d) (1)) the Social Security Board is required to deduct from future benefits any amounts paid during months in which an individual "rendered services for *wages* of not less than $15." Section 209 (a) (42 U. S. C., sec. 409 (a)) defines "wages" as meaning "all remuneration for *employment*," and Section 209 (b) defines "employment" as meaning "any service performed * * * by an employee for the person employing him." Thus if an individual does not receive compensation as an employee, the deduction cannot properly be made. The Social Security Board held that Walker, a lawyer, had been an employee during a period in which he had received over $15.00 per month, and that a deduction should accordingly be made from future benefit payments due him. Walker attacked this decision on the ground that he was not an employee but an independent contractor.

> ship rather than that of the court which the statute made effective provided that judgment was based upon conclusions reasonably reached upon due consideration of all relevant issues presented after parties in interest had been given a fair hearing or a fair opportunity to be heard upon the facts and the applicable law. *Gray* v. *Powell,* 314 U. S. 402.

Both the *Walker* case and the case at bar involved statutory provisions applicable only to "employees"; the board involved in each case was authorized generally to determine whether particular conduct came within the applicable statute, although neither statute contained a clause authorizing the administrative agency specifically to pass upon the existence of the employment relationship.[8] Each statute provided that the administrative findings of fact, if supported by substantial evidence, should be conclusive.[9] The decision in the instant case that a finding that persons are employees presents a question of "law" for independent judicial determination is directly contrary to the holding in the *Walker* case on the same point.

The court below did not disturb the Board's subsidiary findings of fact, but justified the substitution of its judgment for that of the Board with

[8] National Labor Relations Act, sec. 10; Social Security Act, sec. 205 (42 U. S. C., sec. 405 (b)).

[9] National Labor Relations Act, sec. 10 (e); Social Security Act, sec. 205 (g). (42 U. S. C., sec. 405 (g)).

respect to the ultimate finding that an employment relationship existed upon the ground that the interpretation of the statute was involved. But the case does not present an unmixed question of law any more than did *Gray* v. *Powell*, 314 U. S. 402, *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, and *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. See also *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 400. The issue in *Gray* v. *Powell* was whether on undisputed facts a railway company was a "producer" of coal within the meaning of the Bituminous Coal Act; in the *Shields* case whether a railroad was an "interurban" within the meaning of the Railway Labor Act; in the *South Chicago* case whether an employee was a "member of a crew" within the meaning of the Longshoremen and Harbor Workers Compensation Act; and in the *Rochester Telephone* case whether one company was under the "control" of another within the meaning of the Communications Act. In each of the cases cited, this Court recognized that the question as to whether particular facts brought a person within statutory language was a matter of judgment on which the decision of the administrative official was to be accepted, if supported by evidence in the record, and that such questions of administrative

judgment were not to be treated as pure matters of law for purposes of judicial review.[10]

2. The court below held (R. 1848) that the word "employee" as used in the National Labor Relations Act "must be given its conventional meaning as developed under common law and statutory enactments."

We think that the court erred in attempting to interpret "employee" without giving any weight to the policies and purposes of the National Labor Relations Act. "Employee" is not a common law term.[11] This Court and others have recognized in connection with the word "employee" itself that it "is not a word of art having a definite meaning" but "takes color from its surroundings," and in particular from the objects of the statute in which the word is found

[10] The suggestion of the court below (R. 1848) that these cases are distinguishable by reason of the express nature of the authority granted to the administrative body to decide the issue of exemption is without substance. There clearly was no such express delegation in the *South Chicago* and *Rochester* case, or in *Walker* v. *Altmeyer*, *supra*. And the National Labor Relations Board is authorized to conduct investigations of employee representatives and to make findings as to each of the essential ingredients of an unfair labor practice; since there cannot be a certification of representatives or an unfair labor practice unless the employment relationship is found to exist, the Board's power extends to the making of findings as to whether the persons involved are employer and employee.

[11] The common law was concerned with master and servant, not with employer and employee. See Restatement of Law of Agency, secs. 2, 220; Holmes, *Agency*, 4 Harv. L. Rev. 345, 5 *id.* 1.

(*United States* v. *American Trucking Associations*, 310 U. S. 534, 545–546)." "The word 'employed' * * * must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. * * * Such statutes * * * should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, 552–553 (C. C. A. 2, L. Hand, J.) certiorari denied, 235 U. S. 705. See also *Warner* v. *Goltra*, 293 U. S. 155, 158; *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251, 259–260.

The approach adopted by the court below would seem to conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *National Labor Relations Board* v. *Blount*, 131 F. (2d) 585, 590, certiorari denied, 318 U. S. 791, in which the court declared that—

> * * * the question whether persons are or are not employees must always depend upon the particular facts *as they are related to the inquiry in which the question is raised*, * * * if the action had been at common law for damages resulting from failure of a master to perform some duty

[12] The use of "employee" in different federal statutes is reviewed in note 29, p. 545, of the *American Trucking* opinion.

owed to a servant, doubtless other considerations would have been 'deemed relevant. [Italics supplied.]

The Board, of course, agrees that "the statutory definition of the term 'employee' embraces all employees in the conventional as well as legal sense" * * * (R. 108, n. 33). But the fact that persons might not be regarded as employees for purposes of imposing liability upon the employer for injuries to third parties does not mean that labor disputes with such persons will not interrupt interstate commerce or that their continuous relationship to the employer is not of the type calling for collective bargaining in the interest of industrial peace. Cf. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80. In contrast to the preoccupation of the common law with whether the power to control or veto the conduct of another at a particular point in time justifies the finding of a master-servant relationship, the dominant theme of the Labor Relations Act, collective bargaining, requires an emphasis upon the worker's general status and his continuing relationship to the subject matter of collective bargaining, whether or not the employer might be financially liable for his physical conduct at a particular time. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 218–219; *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. (2d) 586 (C. C. A. 2), certiorari denied, 313 U. S. 594.

A purpose to shape this employment concept to the contours of the collective bargaining relation is manifest not only from the specific inclusion of those who would not be covered at common law, such as strikers and those not the employees of a particular employer (cf. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 191–192), but also from the exemption of common law employees such as domestic servants and agricultural laborers (Section 2 (3)). *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board,* 109 F. (2d) 76, 80 (C. C. A. 9), certiorari denied, 310 U. S. 632. The same aim is evident in Section 2 (9) of the Act, which defines "labor dispute" to include a controversy between those who do not stand "in the proximate relationship of employer and employee" (Appendix, p. 28).

In accordance with these principles, many decisions of the Board, involving persons for whose conduct the employer might not have been liable at common law,[13] have brought within the coverage

[13] For example: *Matter of Metro-Goldwyn-Mayer Studios,* 7 N. L. R. B. 662, 686–690 (professional writers working exclusively for one company); *Matter of Seattle Post-Intelligencer,* 9 N. L. R. B. 1262, 1270–1275 (newspaper distributors exclusively for one company, who own their own truck and hire their own assistants); *Matter of KMOX Broadcasting Station,* 10 N. L. R. B. 479 (free-lance announcers and radio artists); *Matter of Connor Lumber & Land Co.,* 11 N. L. R. B. 776 (lumber workers under sole direction of contractor but work on company premises, work functionally coherent with company's business and subject to conditions

of the Act those who do not, in a self-employed capacity, hold themselves out to the general public or a limited portion thereof but are engaged in the day-to-day rendition of service for another in the usual course of a business. It is this type of service that generates problems which constitute the subject matter of collective bargaining; the work of such persons is characterized by con-

established by company); *Matter of Interstate Granite Corp.*, 11 N. L. R. B. 1046 (colorable lease of a department of an enterprise); *Matter of Trawler Maris Stella, Inc.*, 12 N. L. R. B. 415 (fishermen paid in proportion to selling price of catch); *Matter of American Scale Co.*, 19 N. L. R. B. 124 (colorable lease); *Matter of Sun Life Insurance Co.*, 15 N. L. R. B. 817 (insurance canvassers); *Matter of Park Floral Co.*, 19 N. L. R. B. 403 (colorable lease of greenhouses; work of growers a stage in and integral part of company's entire business; leases involved not so much the accomplishment of any specified result as a continuing operation in close association with whole of company's enterprise); *Matter of Edward F. Reichelt et al.*, 21 N. L. R. B. 263 (colorable lease of fur business); *Matter of Kelly Co.*, 34 N. L. R. B. 325 (two truck owners working exclusively for company held employees, three working for others as well held independent contractors); *Matter of Post-Standard Co.*, 34 N. L. R. B. 226 (newspaper distributors, despite method of payment, functionally related to company's business); *Matter of Twentieth Century-Fox Film Corp.*, 32 N. L. R. B. 717 (artists working on premises exclusively for one company held employees; free-lance artists working for various companies held not employees); *Matter of James E. Stark Co.*, 33 N. L. R. B. 1076 (lumber crew working under contractor at hours and wages fixed by company); *Matter of Deep River Timber Co.*, 37 N. L. R. B. 210 (those working under contractors preparing roadways and hauling logs employees of company in view of interrelation of all operations at

ditions which give rise to the method of group, rather than individual, bargaining and to the bargaining sanction of the strike. The facts summarized in the Statement (*supra*, pp. 6–12) fall within this employment concept.

The decision below is important because of its effect on many types of cases (such as those enumerated in note 13, *supra*, pp. 20–22) in which the application of a strict common law test as to the existence of a master and servant relationship might have led to a different result. A ruling by this Court as to the principles to be applied is necessary both to resolve the conflict between the Eighth and Ninth Circuits, and so that the Board may know whether it can continue in the future to be guided by the policies and purposes of the National Labor Relations Act in interpreting the word "employee."

---

logging camp, assumption by company of responsibility for wage payments of both contractors, and past bargaining history); *Matter of John Yasek*, 37 N. L. R. B. 156 (truck owners hauling logs principally for one company); *Matter of Harry Murphy*, 37 N. L. R. B. 487 (owners of single trucks hauling logs, compensated at footage rate; no finding as to owners of more than one truck, since evidence unavailable as to whether such owners are engaged in independently established businesses of trucking and transfer); *Matter of Phelps Dodge Corp.*, 34 N. L. R. B. 846 ("contractor" unloading ore on an equal share carload basis); *Matter of Veta Mines*, 36 N. L. R. B. 288, 292 (sections of mine unprofitable for normal company operation, worked by "leasers" who hired "partners"; both "leasers" and "partners" employees).

3. Even if the common law tests be applied without regard for the policies of the National Labor Relations Act, the newsboys should have been held respondents' employees. In our view, the amount of control over them exercised by respondents requires this conclusion. Cf. *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518. The court below, in treating the newsboys as independent merchants, seems to have given undue weight to the fact that, as persons not working on respondents' premises, their activities were not controlled to the same extent as are those of inside workers [14] and to the fact that the transactions took the form of a sale.[15]

---

[14] For cases holding outside workers with no greater freedom from control than the newsboys to be employees, see, *Andrews* v. *Commodore Knitting Mills, Inc.*, 257 App. Div. 515, 13 N. Y. S. (2d) 577; *Allied Mutuals Liability Ins. Co.* v. *DeJong*, 209 App. Div. 505, 205 N. Y. S. 165 (industrial home workers); *Kaus* v. *Huston*, 35 F. Supp. 327 (N. D. Iowa), aff'd 120 F. (2) 183 (C. C. A. 8) (taxi driver); *Gulf Refining Co.* v. *Brown*, 93 F. (2d) 870 (C. C. A. 4) (oil distributor); *Glielmi* v. *Netherland Dairy Co.*, 254 N. Y. 60, 171 N. E. 906 (milk distributor); *Texas Co.* v. *Zeigler*, 177 Va. 557, 14 S. E. (2d) 704 (oil distributor); *Western Express Co.* v. *Smeltzer*, 88 F. (2d) 94, 96 (C. C. A. 6) (trucker); *Ex parte W. T. Smith Lumber Co.*, 206 Ala. 485, 90 So. 807 (timber sawyer); *Robert C. Buell & Co.* v. *Danaher*, 127 Conn. 606, 18 A. (2d) 697 (securities salesman).

[15] In holding the relationship to involve a series of sales the court below stressed the following considerations which have been held not inconsistent with a personal service relationship: The practice among newsboys of buying and selling valuable corners, *Boehm* v. *Spreckels*, 183 Cal. 239, 191 Pac. 5; the extension of credit, *Pure Baking Co.* v. *Early*

There is a diversity of opinion among the state and lower federal courts as to how common law and related tests should be applied to persons engaged in outside solicitation whose activities are to a large extent subject to control but whose receipt of merchandise often takes the form of a consignment or transaction of sale.[16] Whether such persons are employees is a problem which has frequently arisen under recent social legislation. Indeed, it is often the case, though not here, that employers seek to use this device as a

(E. D. Va.), decided March 24, 1943, Commerce Clearing House, Unemployment Insurance Service, Federal, Par. 9062; dealing in other items, *Press Publishing Co.* v. *Industrial Accident Commission*, 190 Cal. 114, 210 Pac. 820; *Shields* v. *William Freihofer Baking Co.*, 147 Pa. Super. 455, 24 A. (2d) 54.

[16] As to newsboys, compare the cases cited by the court below. (R. 1849) with *Salt Lake Tribune Publishing Co.* v. *Industrial Commission*, 99 Utah 259, 102 Pac. (2d) 307; *Pacific Employers' Insurance Co.* v. *Industrial Accident Commission*, 3 Cal. (2d) 759, 47 Pac. (2d) 270, reversing 38 Pac. (2d) 809; *In re Scatola*, 282 N. Y. 689, 26 N. E. (2d) 815; *Wilson* v. *Times Printing Co.*, 158 Wash. 95, 290 Pac. 691; *Hampton* v. *Macon Printing Co.*, 64 Ga. App. 150, 12 S. E. (2d) 425; *Gallaher* v. *Ricketts*, 187 So. 351, annulled 191 So. 713 (La.). Compare, also: *Matter of Electrolux Corp.*, 288 N. Y. 440, with *Electrolux Corp.* v. *Danaher*, 128 Conn. 342, 23 A. (2d) 135 (sellers of vacuum cleaners); *Schomp* v. *Fuller Brush Co.*, 124 N. J. L. 487, 12 A. (2d) 702, aff'd 126 N. J. L. 368, 19 A. (2d) 780, with *Fuller Brush Co.* v. *Industrial Commission*, 99 Utah 97, 104 Pac. (2d) 201 (Utah, 1940) (sellers of brushes); *Milk Wagon Drivers Union* v. *Lake Valley Farm Products Co.*, 313 U. S. 391, and *Creameries of America* v. *Industrial Commission*, 98 Utah 571, 102 Pac. (2d) 300, with *Mountain Meadow Creameries* v. *Industrial Accident Commission*, 25 Cal. App. (2d)

means of converting salesmen into independent dealers for the purpose of avoiding the effect of such statutes. Cf. *Matter of Electrolux Corp.*, 288 N. Y. 440. It is important both in the interpretation of the National Labor Relations Act and of such legislation as the Social Security Act and the Fair Labor Standards Act that the lower courts be advised whether "employee" is to be interpreted in an enlightened manner which gives effect to the realities of economic relationships and the power of the employer or is to be given a narrow construction such as the court below applied in the case at bar.

CONCLUSION

The questions raised by the decision below are of substantial public importance. The decision fails to follow applicable decisions of this Court

---

123, 76 Pac. (2d) 724 (sellers of dairy products); *In re Foy*, 116 Pac. (2d) 545 (Wash.) with *In re Levine*, 283 N. Y. 577, 27 N. E. (2d) 439 (distributors of cooking utensils); *Globe Grain & Milling Co.* v. *Industrial Commission*, 98 Utah 36, 91 Pac. (2d) 512, amended, 98 Utah 48, 97 Pac. (2d) 582, with *Moorman Mfg. Co.* v. *Unemployment Compensation Commission*, 230 Iowa 123, 296 N. W. 790 (sellers of feed); *In re Fidel Ass'n*, 287 N. Y. 626, 39 N. E. (2d) 265, with *Robert C. Buell & Co.* v. *Danaher*, 127 Conn. 606, 18 A. (2d) 697 (sellers of securities). See also Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 Col. Law Rev. 1015, 1033–1034; *Issues Involved in Determining Eligibility Under the Old Age and Survivors Insurance Program*, Social Security Yearbook, 1941, pp. 47–51; *Some Aspects of Coverage Under Insurance Provisions of the Social Security Program*, Social Security Yearbook, 1940, pp. 74–75.

and conflicts with those of other Circuit Courts of Appeals both on the merits and as to the proper scope of judicial review. It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*) are as follows:

SECTION 1. * * *

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall

not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes

of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in

whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

U. S. GOVERNMENT PRINTING OFFICE 1941